

July 28, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Friedwardt Winterberg

Date of Filing: June 2, 2003

Case Number: TFA-0032

On June 2, 2003, Friedwardt Winterberg filed an Appeal from a determination the FOIA/Privacy Act Group of the Department of Energy (DOE/HQ) issued on May 8, 2003. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

Dr. Winterberg is a professor of physics at the University of Nevada in Reno, Nevada. He responded to a solicitation from the National Nuclear Security Administration (NNSA) for pre-applications in the Office of Defense Programs' Stewardship Science Academic Alliances Program. An NNSA Executive Committee evaluated each pre-application by seeking the opinion of one "reviewer" at each of three DOE laboratories, Lawrence Livermore National Laboratory (LLNL), Los Alamos National Laboratory (LANL), and Sandia National Laboratories (SNL). The reviewers were asked to determine the degree of responsiveness of the pre-application to the technical scope defined in the solicitation--this evaluation was not, however, a review of the merits of the application. *Dr. Friedwardt Winterberg*, 28 DOE ¶ 80,267 at 80,852, Case No. TFA-0011, slip op. at 1 (2003). Based on the opinions of the reviewers, the Executive Committee found that Dr. Winterberg's pre-application did not fall within the technical scope of the solicitation. Consequently, the committee did not encourage Dr. Winterberg to submit a full application. The committee did, however, explain that its decision was not a determination on the merits of the *final* application and that Dr. Winterberg was free to submit a full application if he so desired. *Id.*

Dr. Winterberg filed two FOIA requests for information regarding NNSA's decision, the second of which is the subject of the present Appeal. In his first request, Dr. Winterberg asked for "[a] copy of a report . . . made by a committee of three individuals from Livermore, Los Alamos, and Sandia I tried to get a copy of that report through Senator Ensign . . . so far without success." *Id.*, slip op. at 1-2 (quoting Letter from Winterberg to DOE/HQ (August 19, 2002)). NNSA's Office of Defense Science searched unsuccessfully for responsive documents. *Id.*, slip

op. at 2. The DOE issued a determination informing Dr. Winterberg of the results of NNSA's search, and on December 23, 2002, Dr. Winterberg filed an appeal of that determination with the Office of Hearings and Appeals (OHA). In that Appeal, he argued that it was possible that NNSA rejected his application because he was a German scientist who came to this country after World War II. According to Dr. Winterberg, in 1985, Elie Wiesel, then Chairman of the President's Commission on the Holocaust, made a public statement that it was immoral for the federal government to hire Nazi scientists. Therefore, Dr. Winterberg argued, because Mr. Wiesel made the statement while he was an official of the United States government, his statement became a government policy binding on the DOE. *Id.* In his first Appeal, Dr. Winterberg asked OHA to direct NNSA to release the report and names of the committee members to him so that he can determine if they acted on Mr. Wiesel's "order." *Id.* (quoting Appeal at 2.)

In reviewing Dr. Winterberg's first Appeal, we contacted DOE/HQ regarding the search, and they responded with an explanation, written by NNSA, of the pre-application process. Memorandum from Director, Office of Defense Science, NNSA, to DOE/HQ (September 18, 2002). The solicitation employed a two-part evaluation process for the selection of applications: (1) a pre-application evaluation stage and (2) a full application evaluation stage. In considering pre-applications, the Executive Committee did not complete reports on any evaluations. Instead, a copy of each pre-application was provided to a representative at each respective laboratory. The lab representative then provided a copy of each pre-application to a reviewer, who was tasked to review the technical scope of the pre-application and place it into one of three categories: "Yes" (responsive to the technical scope), "No" (not responsive), or "Uncertain." The reviewers did not use a formal response document, but instead advised their laboratory representatives of their decisions by any method convenient to them at the time (e.g., telephone, face-to-face conversation). Electronic Mail Message from Dr. James Van Fleet, NNSA to Brenda Washington, DOE/HQ (January 28, 2003). The laboratory representatives then reported to NNSA by electronic mail or telephone conversation. NNSA did not monitor this phase, but only recorded the categorization of each application. *Id.* Based on the results of this preliminary review, each applicant was sent a letter discouraging or encouraging them to submit a full application. Despite the results of the review, however, no applicant was prevented from submitting a full application. Dr. Winterberg's pre-application received two Nos and one Uncertain, and NNSA sent him a letter of discouragement. The letter of discouragement did contain a statement that the decision at this stage related to the pre-application only, and did not guarantee acceptance or rejection of a final application. Letter from NNSA to Winterberg (February 20, 2002). The letter also advised the applicant how to submit a full application.

In our decision on Dr. Winterberg's first Appeal, we found NNSA's argument (that the committee did not complete written evaluation reports at the pre-application stage) to be reasonable. As described above, the pre-application evaluation phase was intended to be a fast, preliminary review and screening of the pre-applications. It was designed to provide pre-applicants some idea of how their pre-application matched the defined technical scope of the project, and was not intended to be a detailed review of the entire application. Given the informal

nature of the process, we found it reasonable that no documents were created. Thus, our decision found that NNSA has conducted an adequate search for responsive material. We also noted in that decision that Dr. Winterberg had indicated in his Appeal that he wanted to know the names of the reviewers at the DOE labs who reviewed his pre-application, and stated that he could file a new FOIA request for those names.

On February 13, 2003, Dr. Winterberg filed a new FOIA request "to obtain the names of the three individuals . . . from [LLNL, LANL, and SNL] . . . who allegedly had downgraded my proposal." DOE/HQ responded to the request on May 8, 2003, informing Dr. Winterberg that the NNSA Office of Defense Programs had "completed its search for documents responsive to the request. The search did not locate any responsive documents." Letter from Abel Lopez, DOE/HQ, to F. Winterberg (May 8, 2003). The present Appeal considers the adequacy of this most recent search for documents.

II. Analysis

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

Accordingly, we contacted NNSA and found out the following regarding its search. After receiving Dr. Winterberg's most recent request, NNSA sent an electronic mail message to each of the laboratory representatives to whom it had provided pre-applications. This message stated, in pertinent part,

NNSA has received a Freedom of Information (FOIA) request from Dr. Friedwardt Winterberg, The FOIA request seeks the names of the laboratory scientists who reviewed Dr. Winterberg's pre-application.

. . . .

Please search your records to determine whether you have any relevant document(s), including e-mail messages, which provide information from your laboratory reviewer's categorization of Dr. Winterberg's pre-application. We are only looking for documents that pertain to the labs review of Dr. Winterberg's

pre-application. Thus, please do not send us your records about reviews of other pre-applications.

The response to this message from each of the three laboratories reported that no documents were found. NNSA explained to us that two contacts at each of the three laboratories were responsible for distributing the pre-applications to reviewers at the lab. Many reviewers were used at each laboratory, but Dr. Winterberg's pre-application (as was the case with each of the other pre-applications) was seen by only one reviewer at each laboratory. The search for documents in the present case included each of the laboratory contacts. Memorandum of telephone conversation between Andrea Kasarsky and Sherri Bingert, NNSA, and Steven Goering, OHA (June 25, 2003). Subsequent to the filing of the present Appeal, we asked NNSA to confirm that the search also extended to the reviewer at each laboratory who reviewed Dr. Winterberg's proposal. NNSA did so, and reported back to us that only one of the laboratory contacts remembered the reviewer to whom he provided Dr. Winterberg's pre-application. That contact checked with the reviewer, who also did not locate any documents responsive to Dr. Winterberg's request. Memorandum of telephone conversation between Andrea Kasarsky and Sherri Bingert, NNSA, and Steven Goering, OHA (July 15, 2003).

Based on the above descriptions, it appears clear to us that NNSA performed a diligent search of locations where responsive documents were most likely to exist. We therefore conclude that the search was reasonably calculated to uncover the records Dr. Winterberg seeks. Thus, the present Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Friedwardt Winterberg, Case Number TFA-0032, is hereby denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 28, 2003